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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1970

No. 203

DENNIS COUNCLE McGAUTHA,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE
and
BRIEF AMICUS CURIAE

LUKE McKISSACK
Attorney at Law
Suite 521
6430 Sunset Boulevard
Hollywood, California

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LUKE McKISSACK
Attorney at Law
Suite 521
6430 Sunset Boulevard
Hollywood, California
(213) 466-7331

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DUKE MORISSACK
Attorney at Law
Suite 521
9430 Sunset Boulevard
Hollywood, California
(213) 466-7301

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

While counsel is in full accord with the principles set forth in Petitioner's Brief in McGautha vs. California, No. 203, he presently has two clients on California's Death Row, see People v. Gilbert, Crim. No. 13848, and People v. Sirhan, Crim. No. 14026, whose fate may well be determined by this Court's resolution of McGautha; therefore, he feels obligated and desirous of submitting additional argument for the consideration of this Court. Moreover, both of counsel's cases now on appeal to the California Supreme Court concern the same statutes which are in issue in McGautha v. California. For these reasons, we thus respectfully move for leave to file this brief amicus curiae, urging reversal.

Regrettably, this brief is being offered at a later date than contemplated by Rule 42 due to factors beyond my control. In the first place the argument I present herein was formulated and written only a couple of months ago due to the timing of the Sirhan and Gilbert appeals. Secondly, I have recently travelled to Africa and although I made arrangements before my departure to file this motion and brief with

the Court, through oversight by my office personnel this was not done.

I was yesterday informed by the office of the California Attorney General that both Petitioner's Opening Brief and Respondent's Brief have been filed and the case has been moved up so that the oral argument will take place in two weeks.

Attorney Herman Selvin, Counsel for Petitioner, was contacted during my trip to Africa and again yesterday and welcomes the filing of this brief. I spoke with Ronald George who wrote the brief for the State of California and will argue the case and William James, who is in charge of the Appellate Section of the Attorney General's Office, and explained the mixup previously described. I gave them a copy of the brief and discussed with them what new I had to offer. I also examined Professor Amsterdam's Brief. I glanced at the Attorney General's Brief and had previously read the brief submitted by Herman Selvin for Petitioner.

My brief is but 32 pages in length and pages 17-32 consist of material which while richly alluded to - particularly by the Attorney General - is not presented in the depth or fashion as presented in my brief. I feel that it will assist the

Court in determining this controversy. The thrust of my analysis which probes deeply into the empirical study reported as A Study of the California Penalty Jury In First Degree Murder Cases, 21 Stan. L. Rev. 1297 (1969) is that juries who are given no standards to govern the interpretation of evidence habitually decide cases on constitutionally impermissible factors.

My brief can in a sense be regarded as a reply to certain arguments of the Attorney General and Petitioner still has time within which to file a reply brief. The sources for the argument are all cited in Respondent's Brief and he is familiar with them.

Inasmuch as this Court and the parties will not be injured by my lodging the brief with the Court and it could prove helpful and is short, my clients are directly concerned with the outcome of this case, and I have expended money having the brief prepared and processed, which would have filed more promptly excepting clerical error, I'm hopeful the Court will accept the brief and record my appearance Amicus Curiae.

Of course, in view of the time problem I do not request to submit an oral argument.

Respectfully submitted,

Luke McKissack

LUKE McKISSACK

I

CALIFORNIA'S PRACTICE OF ALLOWING CAPITAL TRIAL JURIES ABSOLUTE AND ARBITRARY POWER TO ELECT BETWEEN THE PENALTIES OF LIFE AND DEATH AT THE PENALTY PHASE DENIED PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

Knowledgeable observers of the infliction of capital punishment in the United States, both penologists and physicians, agree that death is meted out among persons convicted of capital crimes in a manner that is uneven, rationally unsupportable and wholly arbitrarily:

> "Of all the uncertain manifestations of justice, capital punishment is the most inequitable. It is primarily carried out against the destitute, forlorn and forgotten ... Members of racial and cultural minority groups suffer most. The hundreds of extraneous factors, including geography, that decide whether a convicted man will actually live or die, makes capital punishment a ghastly, brainless lottery." (Dr. Louis J. West, "A Psychiatrist Looks

at the Death Penalty", Paper presented at the 122nd Annual Meeting of the American Psychiatric Association, Atlantic City, New Jersey, May 11, 1966, p. 2).

This arbitrariness in the selection of men to be put to death takes several forms. First, there is baseless discrimination among individuals -- a freakish, whimsical, and erratic difference in the treatment of similar men guilty of similar offenses. Thus, the former Attorney General of the United States stated:

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes are equally, or more atrocious, than those of men on death row." (Statement by Former Attorney General Ramsey Clark, Before the Sub-Committee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, To Abolish the Death Penalty, July 2, 1968, Department of Justice release, p. 2).

Those who have watched this society brutally inflict death corroborate the Attorney General in his condemnation of the death

penalty. Thus, the respected former warden of San Quentin, Clinton T. Duffy, remarks as follows:

"I hate the death penalty because of its inhumanity. Doomed men rot in a private hell while their cases are being appealed, and they continue to rot after a death date is set. They live in the company of misery, not only their own but their neighbors! They know there are two roads out of death row, and that they might well have to take the one which leads to the gas chamber.

One night on death row is too long, and the length of time spent there by the Chessman's and many others constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.

***

I hate the death penalty because it is a brutal spectacle. There is nothing good about an execution, and no one is satisfied when it is over. Even those who say that justice has been served leave the death house white and shaking and determined never to return." (Duffy & Hirshberg, 88 Men and 2 Women (1962), p. 254. See also Lawes, Twenty Thousand Years in Sing Sing (1932), pp. 302,

307-310).

Similarly, Dr. Louis West, concludes that the death penalty is the most barbaric relic of a past society and brutally degrading to members of an enlightened society:

> "The death penalty is cruel. Everyone must die, but only the condemned prisoner is subjected to the terrible agony of prolonged waiting --- sometimes for years, tormented by hope -- to be deliberately slaughtered by a self-righteous society. This torture is harsher than the thumbscrew and rack. Inhuman. The killing of a helpless captive is a brutally degrading experience. If those alone who have participated in an execution could vote on the death penalty, it would be abolished tomorrow." (West, Scientific Reflections on the Death Penalty, a paper delivered at the Center for the Study of Democratic Institutions, Santa Barbara, California, 1967).

Second, there is both economic and caste discrimination in the infliction of death:

> "The Death Penalty ... almost always hits the little man, who is not only poor in material possessions but in background, education, and mental capacity as well. Father Daniel McAllister, former Catholic Chaplain at San Quentin,

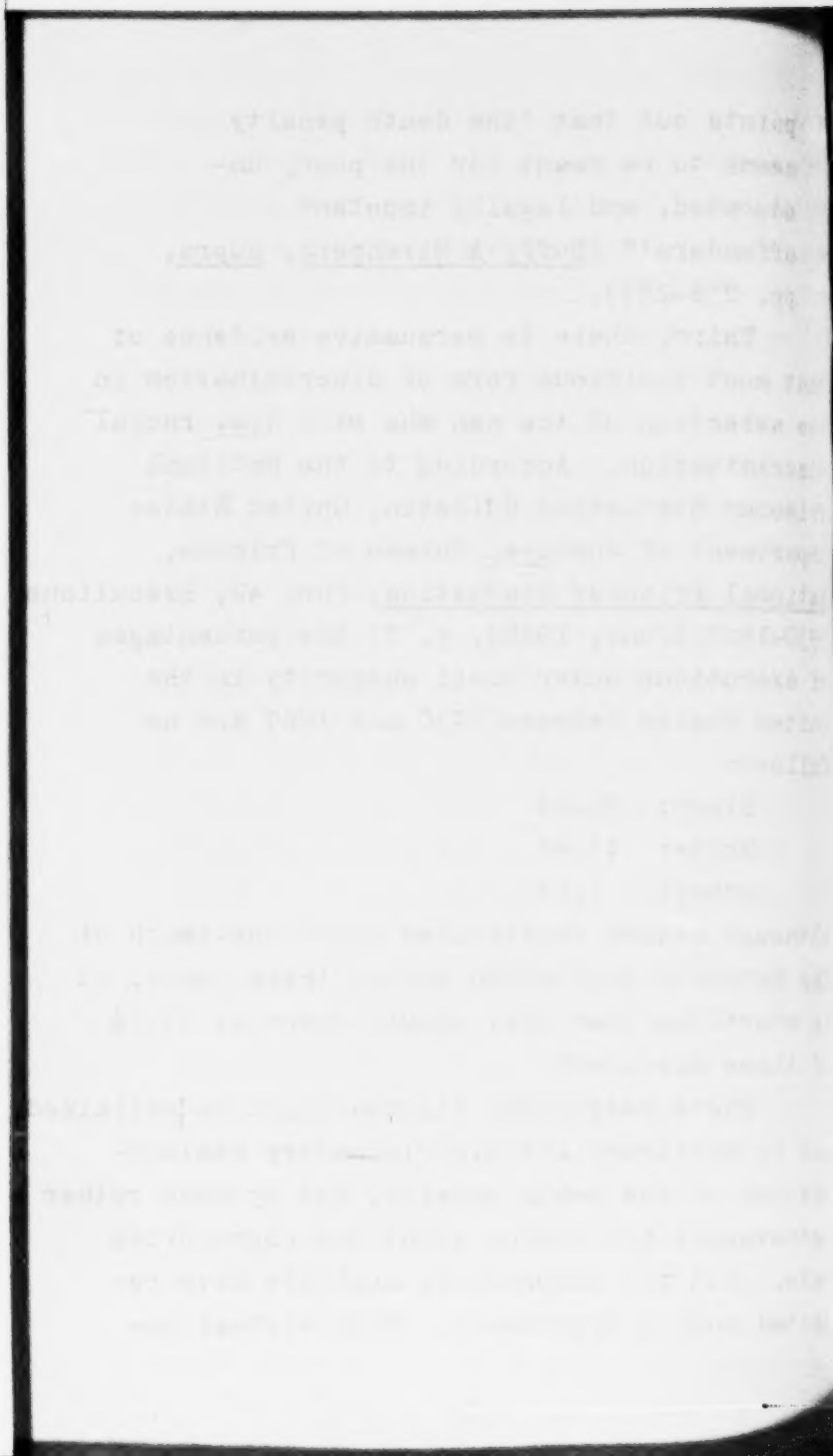
points out that 'the death penalty seems to be meant for the poor, uneducated, and legally impotent offenders'" (Duffy & Hirshberg, supra, pp. 256-257).

Third, there is persuasive evidence of that most invidious form of discrimination in the selection of the men who will die, racial discrimination. According to the National Prisoner Statistics Bulletin, United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, (No. 42, Executions 1930-1967 (June, 1968), p. 7) the percentages of executions under civil authority in the United States between 1930 and 1967 are as follows:

Black: 53.1%
White: 45.4%
Other: 1.1%

Although blacks constituted about one-tenth of the Nation's population during these years, it is startling that they should comprise 53.1% of those executed!

These suspicious figures might be explained, not by arbitrary and discriminatory administration of the death penalty, but by some rather extravagant hypotheses about the negro crime rate. But all responsible analysts have rejected such a hypothesis. With virtual un-



animity, commissions and individuals studying capital punishment have found "evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups". President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967), p. 143. See also United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968), pp. 32, 98; Mattick, The Unexamined Death (1966), pp. 5, 17; Bedau, The Death Penalty in America (1964), pp. 411-413; Bedau, "A Social Philosopher Looks at the Death Penalty", 123 Am. J. Psychiatry 1361, 1362 (1967); Rubin, "Disparity and Equality of Sentences -- A Constitutional Challenge", 40 F.R.D. pp. 55, 66-68 (1966); Johnson, "Selective Factors in Capital Punishment," 36 Social Forces 165 (1957).

The only mediating links between the statutory authority for the death penalty for a crime and its actual use against the few, arbitrarily selected outcasts yearly chosen to die are provided by the death-sentencing procedures challenged in the present case.

It is these procedures by which laws of apparently uniform application are converted in practice into instruments of the most vicious discrimination and effectively precludes constitutional control of particular death sentences rendered by individual juries. If the arbitrariness and discrimination infecting the administration of the death penalty are to be regulated, it must therefore be through judicial scrutiny of the procedures that permit and encourage such use.

Herbert Wechsler has observed that: "most dramatically when life is at stake, equality is a most important element of justice". "Symposium on Capital Punishment", 7 N.Y.L.F. 250, 259 (1961). The Fourteenth Amendment makes it an indispensable element of justice under the Constitution; and the Due Process Clause particularly is designed to assure the regularity of procedures necessary to control against uneven and unfair, arbitrary impositions upon the individual. What is in issue in this case is the essential fairness, regularity and evenhandedness required by Due Process in proceedings by which the state determines to take human life.

- A-

THE POWER GIVEN CALIFORNIA JURIES IS ESSENTIALLY LAWLESS.

Sections 190, 190.1 California Penal Code (set forth in A1, A2), authorize the jury to choose between a sentence of life imprisonment and the death penalty and to make that choice "in its discretion". The discretion of the jury under this sentencing procedure is absolute. This is borne out by the California Supreme Court's recent decision in In re Anderson, 69 Cal . 2d 613, 622; 73 Cal. Rptr. 21, 447 P2d 117 (1968).

"This court has held repeatedly that under Sections 190 and 190 .1 the Legislature has entrusted to the absolute discretion of the trier of fact the awesome decision between life imprisonment and death for first degree murder (citations), and that the law does not prescribe or authorize the court to innovate any rule circumscribing the exercise of that discretion -- that the jury need not find ameliorating circumstances to impose life imprisonment, nor need they find aggravating circumstances to impose death."

It is important to note the salient characteristics of the death-sentencing process

just described.

First, the objective of the process is to differentiate among individuals, in order to select from the total number of men con - victed of first-degree murder those who will live and those who will die. The purpose for which this differentiation is made is the most arcane, the most intractable judgment known to the criminal law.

> "It should be understood that much more is involved here than a simple determination of sentence. For the State ... empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." Witherspoon v . Illinois, 391 U.S. 510, 521 n. 20; 88 S. Ct. 770, 20 L. Ed. 2d 776 (1968).

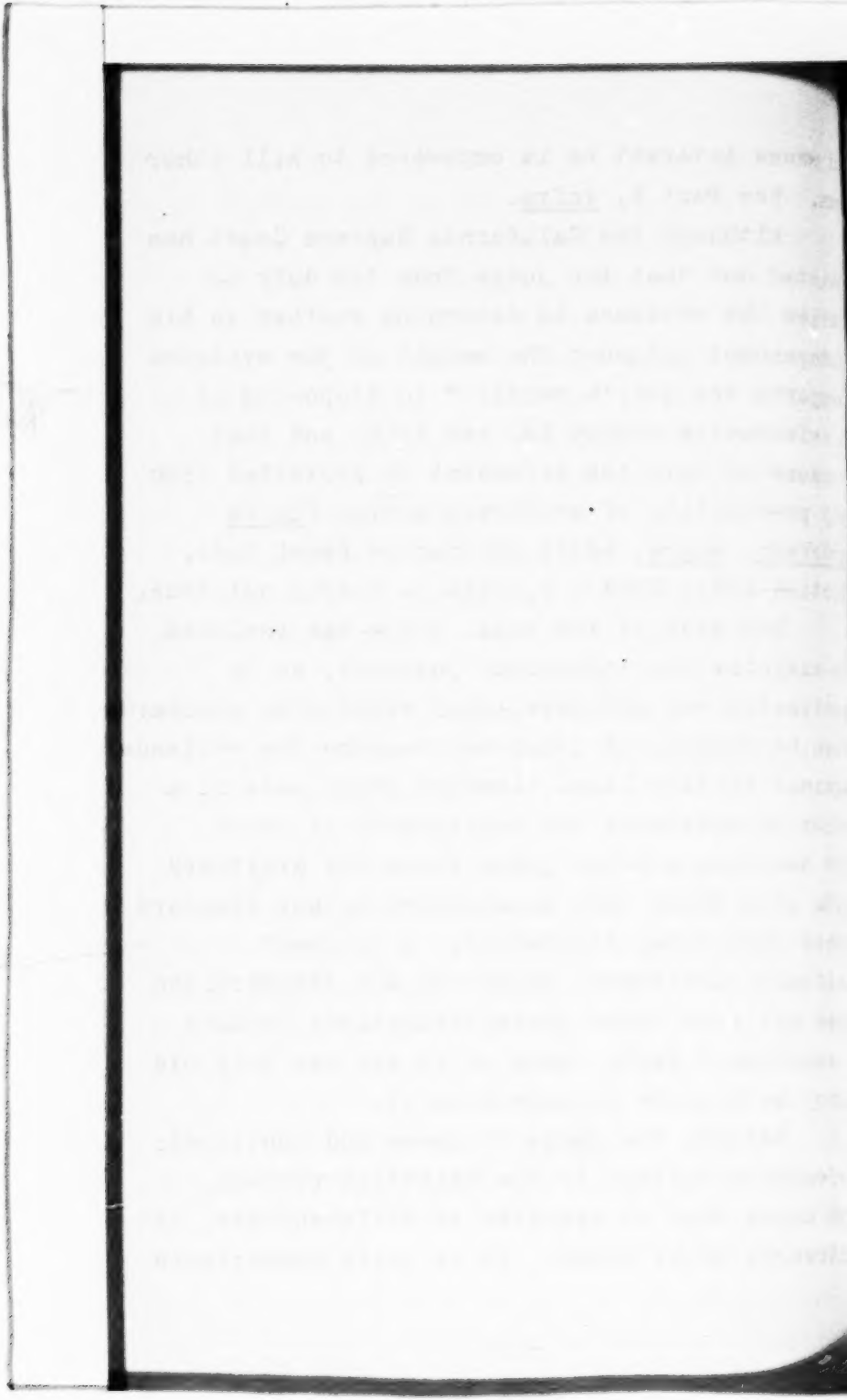
The ends thought to be served by capital punishment -- hence, the considerations which conceivably bear on the fitness of prescribing it in a particular case -- are variable, and hardly a matter controlled by consensus or en- lightened by the commonly shared values of our society. Since California's legislature has not identified the ends which it thinks worthy of consideration in imposing the death penalty, the sentencer - - be he judge or juror -- is informed only by his personal intuition and particularistic experience concerning the goals

in whose interest he is empowered to kill other men. See Part B, infra.

Although the California Supreme Court has pointed out that the judge "has the duty to review the evidence to determine whether in his independent judgment the weight of the evidence supports the jury's verdict" in disposing of a defendant's motion for new trial and that because of this the defendant is protected from any possibility of arbitrary action (In re Anderson, supra, 623); California Penal Code, Section 1181, Subd . 7, this is simply not true.

But even if the trial judge was inclined to exercise his individual judgment, as he manifestly was not here, what meaningful standards does he employ. A judge may measure the evidence against certain legal elements which make up a crime to determine the sufficiency of proof but how does a trial judge check the arbitrary acts of a trial jury unharnessed by any standard other than total discretion. A judgment initially arbitrary, whimsical and standardless does not lose those characterizations because a subsequent party hears of it and has only his fancy as a guide to assessing it.

Second, the range of cases and convicted defendants subject to the selection process, and among whom it operates to differentiate, is extraordinarily broad. It is quite conceivable



that the legislature which authorized the death penalty for many different offenses thought it should be used where such offenses occurred. But, in practice, it is used in only a relatively small number. See United States Department of Justice, Bureau of Prisons, National Prisoner Statistics Bulletin, No. 42, Executions 1930-1967 (1968), 12-17; Kalven & Zeisel, The American Jury (1966), 435-436; State of California, Department of Justice, Division of Law Enforcement, Bureau of Criminal Statistics, Report (Crime and Delinquency in California: 1967 (1968), 140; Johnson, "Selective Factors in Capital Punishment," 36 Social Forces 165, 166 (1957); Bedau, "Death Sentences in New Jersey 1907-1960", Rutgers L. Rev. 1, 30 (1964). The prescription of the death penalty, with its discretionary application, is therefore a striking example of purposive overbreadth -- that style of legislation which sweeps far more broadly than its intended target, leaving to ad hoc judgment in administration the job of deciding what that target shall be.

Third, in the case of the death penalty, the instrument of administration is the lay jury, selected to try a particular case. Recognition of the virtues of the jury trial does not preclude the simultaneous recognition that the jury trial also has certain peculiar dangers, requiring special safeguards under the Constitution. See Jackson v. Denno, 378 U.S. 368 (1964);

Rideau v. Louisiana, 373 U.S. 723 (1963); Bruton v. United States, 391 U.S. 123 (1968); People v. Aranda, 63 Cal. 2d 518 (1965). It can hardly be doubted that the very nature of the jury system makes it least capable of developing uniform and consistent rules of decision.

> "(T)he transitory nature of jury service virtually precludes rational sentencing." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Courts (1967), 26.

In this regard, it is instructive to compare the jury with a sentencing judge. At the outset, it should be noted that sentencing by judges in this country has itself fallen far short of the marks of regularity and even-handedness. See, e.g., Rubin, "Disparity and Equality of Sentences -- A Constitutional Challenge", 40 F.R.D. 55 (1966); Institute of Judicial Administration, Disparity in Sentencing of Convicted Defendants (1964). Nevertheless, the judge is, at least, a professional sentencer. The very fact that he sentences a considerable number of offenders promotes some consistency in his sentencing. As a professional, he is somewhat better guarded against unexamined visceral urges and inflammable emotions than are lay jurors. Notwithstanding all of the moderating forces of judicial sentencing, it is often extremely erratic. How much more erratic and

uneven then must jurors natively tend to be, who are subject to not a single one of the controls working on the judge? The prospect that, without rules, the jurors will themselves supply uniformity or regularity is hopeless.

Fourth, the power of the life-or-death decision given to the jury is absolutely lawless. It is a raw, arbitrary power to kill or to let live, unguided by principle, undirected by concern for specified relevant facts, uncontrolled by any general principle of law, unleashed of any requirement that it be exercised pursuant to valid reasons, and uncontrollable. It is, simply, the power to take away a man's life for any reason (good or bad, rational or irrational, logical or illogical, legal or illegal) or for no reason at all or because the defendant did not take the witness stand or unsuccessfully attempted an insanity defense (see Part B, infra). As will be discussed shortly, there is substantial evidence that California juries are lenient toward white-collar defendants on the basis of their occupational status alone. This economic bias of the present system is an irrational standard of decision-making and thus in violation of due process and equal protection. Griffin v. Illinois, 351 U.S. 12 (1956). See also "A Study of the California Penalty Jury in First-Degree-Murder Cases', 21 Stan. L. Rev. 1297, 1419 (1969); Willcox & Bloustein, "The Griffin Case -- Poverty and the Fourteenth Amendment", 43 Cornell L.Q. 1 (1956).

Several extraordinary features of the death-sentencing process by the lay jury emerge:

(1) Its exercise is not required to rest upon any prerequisite finding of fact. Such findings are, of course, required to support virtually every other judgment of a jury in our legal system;

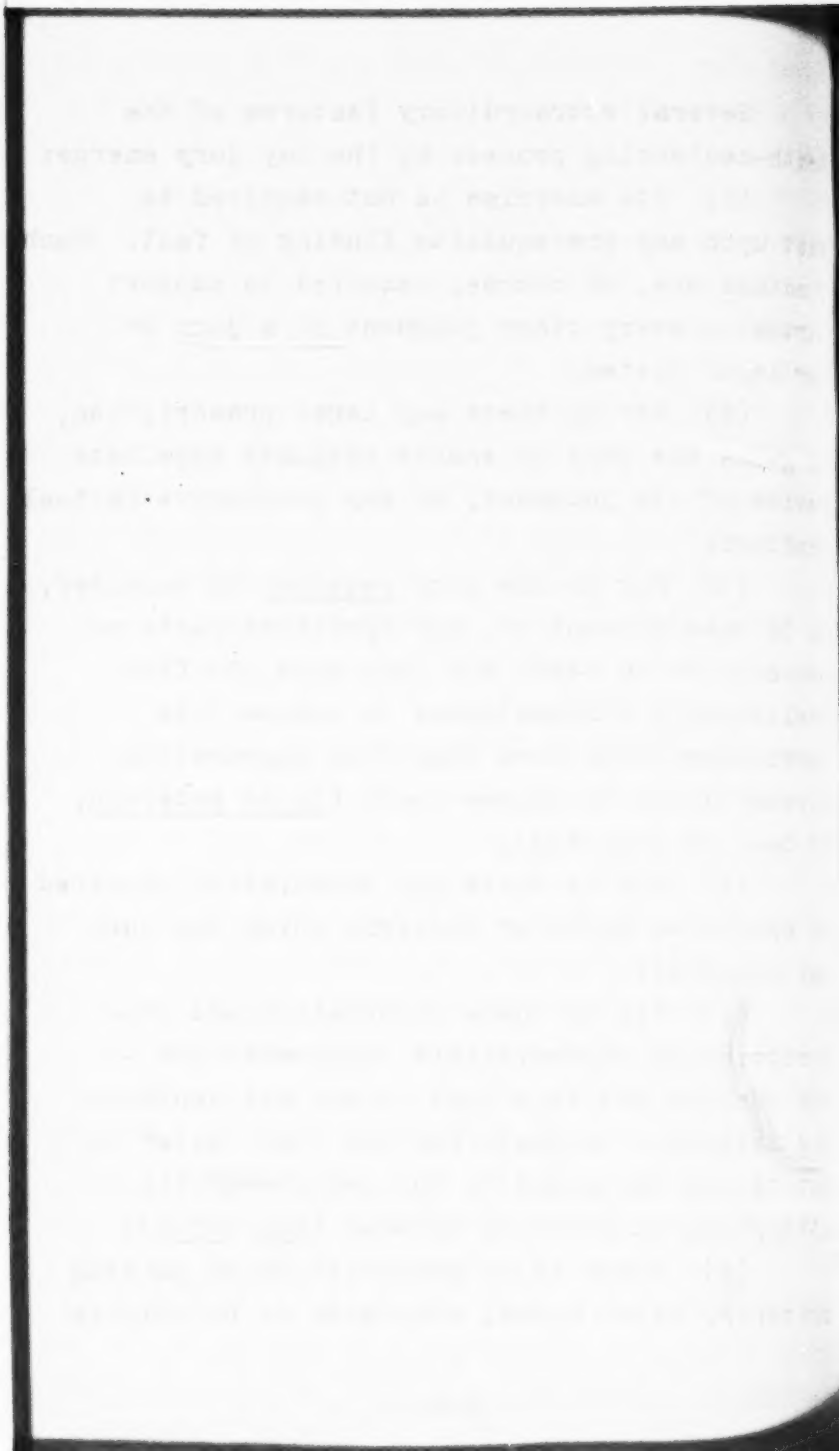
(2) Nor is there any legal prescription, to guide the jury or enable adequate appellate review of its judgment, of any preclusive factual findings;

(3) Nor is the jury required to consider, or to take account of, any specified facts or concerns -- in fact, the jury need not find ameliorating circumstances to impose life imprisonment nor need they find aggravating circumstances to impose death (In re Anderson, 69 Cal. 2d 613, 633);

(4) Nor is there any enumeration required of specified facts or concerns which the jury may consider;

(5) Nor is there enumeration and proscription of impermissible considerations -- the jury is not told that it may not sentence the defendant to death for his "bad taste" in not taking the stand or for unsuccessfully attempting an insanity defense (see infra);

(6) There is no prescription of guiding criteria, legal norms, standards or principles



for judgment. The jurors are not directed or required to discuss or to agree upon any common set of principles, and the court's instructions give them nothing to focus any such discussion:

> "The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> ... Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty .... Yet who can say that these factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under some inner compulsion and should not die? [People v. Hines, 61 Cal. 2d 164, 169, 390 P2d 398, 37 Cal. Rptr. 622 (1964)].

(7) There is no prescription even of the ultimate legal goals and purposes to be considered in the formulation of criteria to guide the death-sentencing decision. The power of the life-or-death decision is wholly

unguided and unconstrained, unlike any other decision made by a lawful tribunal within our legal traditions. Kalvin & Zeisel, The American Jury (1966), 435. Such a power is tantamount to submitting to a jury in a civil case the naked question: "Should the defendant be liable to the plaintiff?" -- or, in a criminal matter: "Has the defendant done soemthing wrong?"

> "We wouldn't turn it over to a jury, the determining of whether the father or the mother or whether the grandmother or a sister -in-law got the child, according to the absolute whim or caprice, or, as you put it, the discretion of the jury the determination of whether a fox terrior belonged to the husband or the wife in a separation . We wouldn't let a jury determine that with absolute discretion. Any issue in the whole legal system that you can think of, rights, property rights, personal rights, are guided by precedents, by standards, and to leave to a jury the absolute discretion to determine whether a person lives or dies, without any guidance, or any compass or standard, principles or anything else, is foreign to the whole basic tradition of the Anglo -Saxon common law. That is the hurdle you have to face and that the Court has to meet in passing on this question." (State-

ment by Chief Justice Traynor during a colloquy with the Assistant Attorney General, Transcript of Proceedings in the Supreme Court of California, In re Anderson, Crim. No. 11, 572, March 28, 1968, pp. 107-108. But cf. Id., at pp. 113-114, 120-121).

(8) There is no review of the jury's decision, and no judicial safeguard of any sort against invidious discriminations and other abuses. It is therefore not surprising that the performance of jurors in the exercise of the lawless discretion given them is not merely irregular (see Kalven & Zeisel, The American Jury (1966), 437-449) and arbitrary in particular cases (see supra, pp. 1-3, but exhibits grossly unconstitutional considerations (see infra).

-B-

EMPIRICAL EVIDENCE INDICATES THAT UNCONSTITUTIONAL FACTORS ARE TAKEN INTO CONSIDERATION BY THE JURY IN DETERMINING PENALTY; SUCH CONSIDERATIONS ARE IRRATIONAL AND THUS VIOLATIVE OF DUE PROCESS AND EQUAL PROTECTION.

The conclusion that the jury is swayed by impermissible considerations is dramatically supported by a recent empirical study conducted by the members of the Stanford Law Review. "A Study of the California Penalty Jury in First-

Degree-Murder Cases", Stan. L. Rev. 1297 (1969).

The goal of the study was to determine the fairness of the decision made by California penalty juries by isolating those aspects of the case -- such as the circumstances of the crime and the background of the defendant -- that appeared to have the greatest statistical association with their penalty outcomes. The authors, with the assistance of law students and statisticians, gathered and analyzed data on the 238 first-degree-murder cases in California where penalty was determined between 1958 and 1966 by the same jury that had earlier determined guilt. After formulating a questionnaire covering all obtainable data that might conceivably have entered the jury's consideration, the authors collected data from the state files of the California Department of Corrections in Sacramento and the California Medical Facility at Vacaville. In addition, the questionnaire was sent to every judge, prosecutor, and defense attorney involved in the 238 cases after personally contacting them to enlist their cooperation. After checking the reliability of the responses, a master questionnaire was prepared for each defendant. The responses were subsequently fed into computers and the following statistical techniques employed to analyze the data: multiple-regression analysis, partial correlation, factor analysis, and cluster analysis. For a more extensive discussion of the techniques employed, see Appendices C ("Methodology") and D

("Statistical Methodology"), 21 Stan. L. Rev., 1297, 1462, 1476 (1969). A total of 178 measurement variables (that is, the pattern or standards), ranging from such aspects as the socioeconomic background of the defendant to the defenses attempted at the penalty trial, were taken into account. To quote the authors:

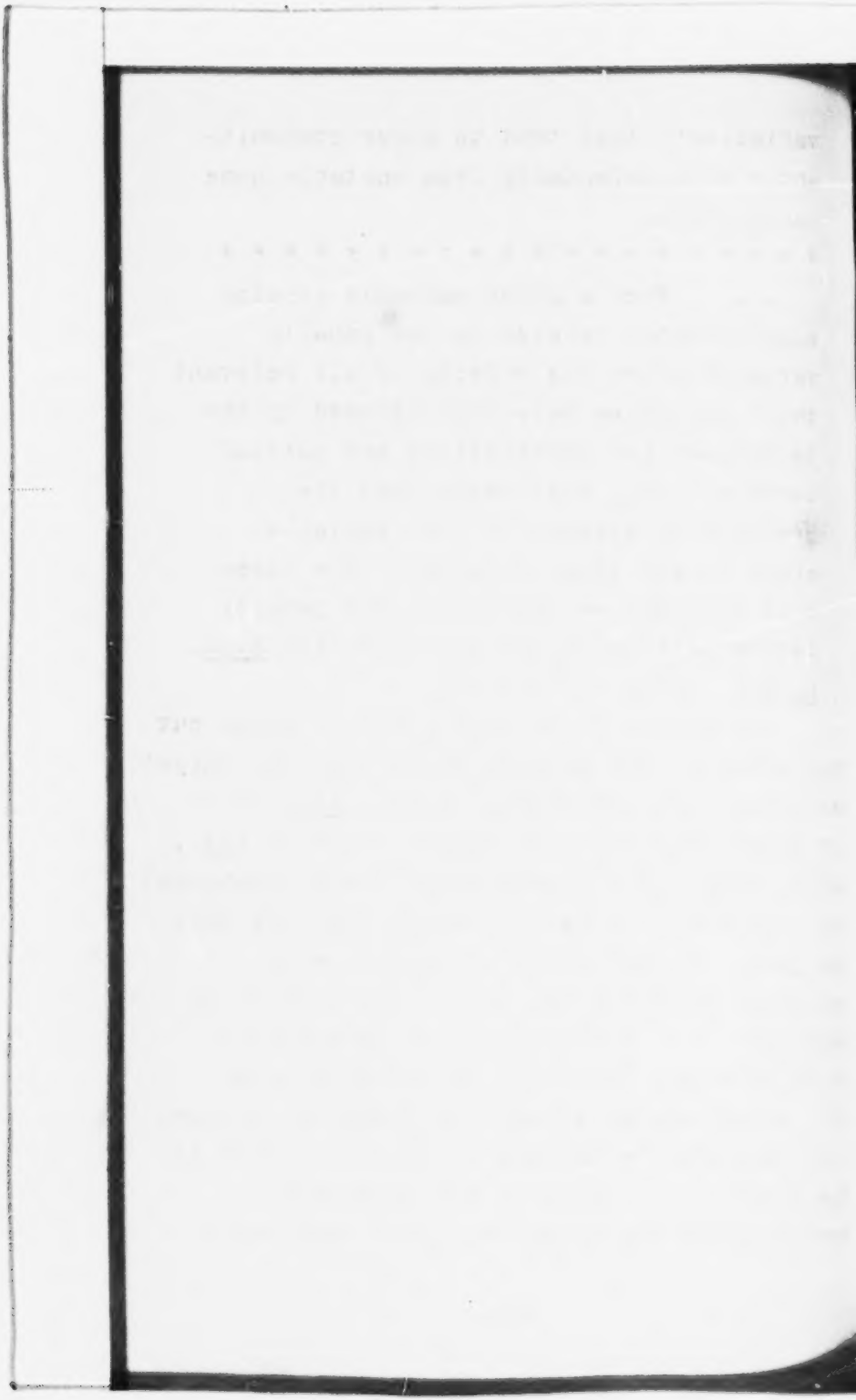
"The general concept employed in the study to determine whether the penalty juries followed standards in the cases is known as "statistical inference." The logic of this approach is quite simple: If a given measurement variable (such as a particular attribute of the defendant or a circumstance of the crime) appeared significantly more often than is likely due to chance alone in those cases where the juries chose the death penalty and if the presence of that variable in the death cases cannot be explained by the simultaneous presence of one or more other measurement variables, then a meaningful association has been established. For example, suppose it is discovered on the basis of simple percentages that defendants with unstable home backgrounds are peculiarly death-prone. To verify that this is a causal relationship, one must take into account the possible effects of all other measurement variables (known as "third

variables") that tend to occur concomitantly with defendants from unstable home backgrounds.

* *

. . . When a given variable remains significantly related to the penalty variable after the effects of all relevant third variables have been removed by the techniques [of correlations and partial correlations], that means that the presence or absence of that variable alone -- all other aspects of the cases held constant -- influenced the penalty determinations of the juries." (21 Stan. L. Rev. 1297, 1316-1317).

Initially, it is sufficient to point out that although the authors found that the jurys' decisions were not wholly random (Id., 1419) nor apparently based on racial criteria (Id., 1421), they did discover significant irrational and impermissible factors which did influence the jury. In particular, the following variables affected the jury's decision as to penalty: (1) introduction of defendant's prior criminal record at the penalty trial; (2) unsuccessful attempt of insanity defense; (3) defendant's failure to take the stand at the guilt trial, and (4) the defendant's occupational status and economic background.



(1) INTRODUCTION OF PRIOR CRIMINAL RECORD:

The aspect of the cases with the greatest impact on penalty was the presence or absence of a prior criminal record. Defendants with such a record were considerably more likely to receive the death penalty on the basis of that attribute alone. At first glance this seems a highly rational criteria; juries are harsher on those defendants who have allegedly proven themselves to be dangerous in the past. However, the authors found that the juries apparently did not discriminate between particular aspects of criminal history -- for example, between prior violent and nonviolent crimes:

> "The juries were apparently influenced by the mere fact that 'priors' were put into evidence in the penalty trial, regardless of the specific content of those records." 21 Stan. L. Rev. 1297, 1326.

Thus, the incidence of the death penalty was sharply higher when prior criminal records were introduced in full or in part against defendants at the penalty trial. Where all of the defendant's prior criminal record was introduced at the penalty trial, 57.5% of the defendants received the death penalty. In contrast, where none of the defendant's prior record was introduced, only 14.3% of the

defendants received the death penalty while 84.7% received life imprisonment. See Table C89, Id., 1412.

(2) UNSUCCESSFUL ATTEMPT OF INSANITY DEFENSE:

Those defendants who unsuccessfully attempted an insanity defense received the death penalty substantially more frequently than those who did not. Of the 37 who pleaded insanity, 25 (67.5%) received death and 12 (32.5%) received life imprisonment. Of their 199 counterparts who did not so plead, 77 (38.7%) received death and 122 (61.3%) received life imprisonment. Id., 1361. The authors suggest that either the juries "may have regarded attempted insanity defenses as admissions of guilt" or "been irritated by futile, and possibly transparent, attempts at insanity defenses." Id., 1362 . In either case they conclude as follows:

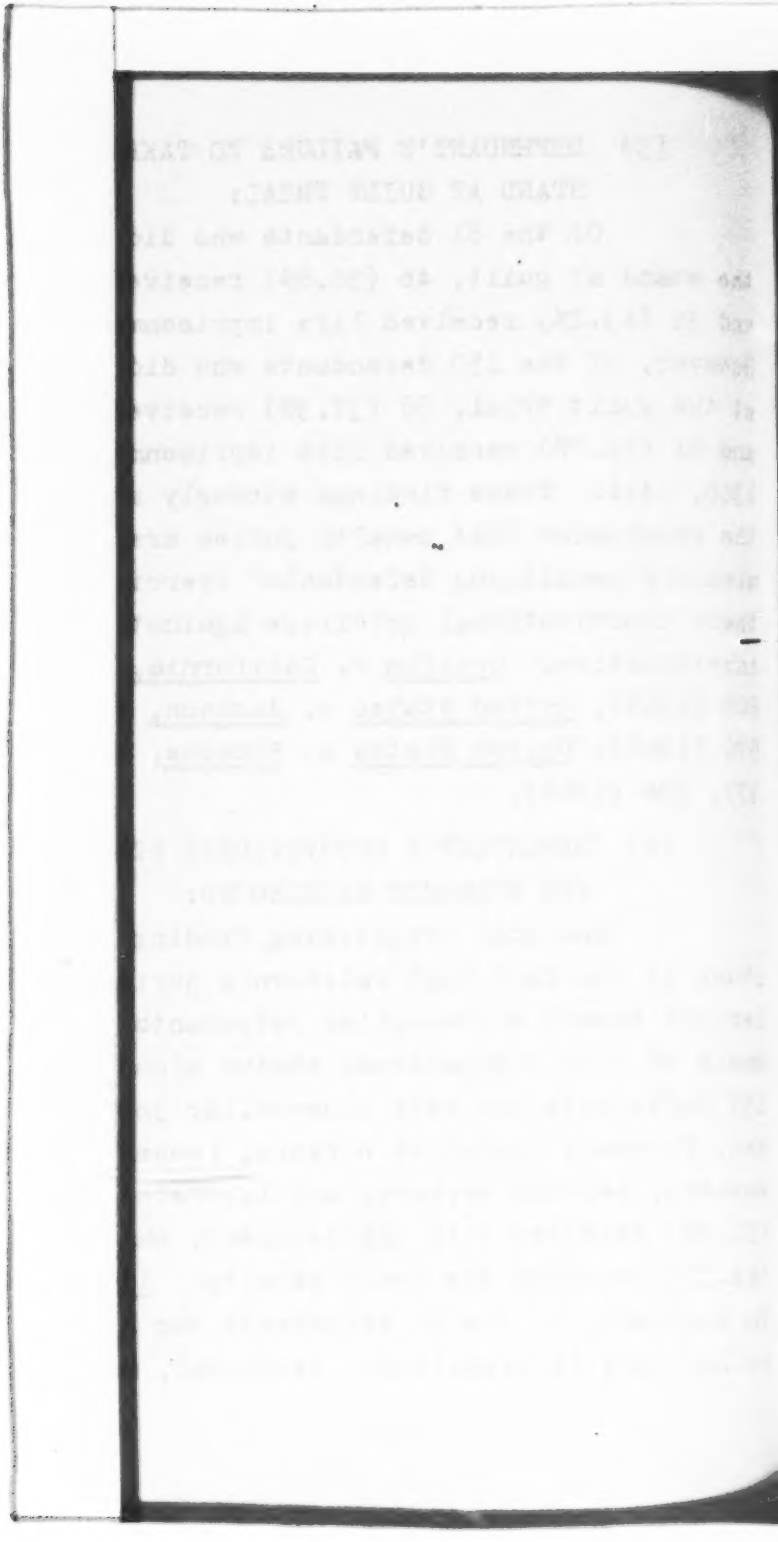
> "In that both of these hypotheses suggest that the defendant who makes an insanity defense prejudices his chances on penalty, they both fly in the face of the likely legislative purpose in establishing a separate trial in which the only issue is insanity -- to make it possible for a defendant to so plead without prejudicing his trial on guilt." (Id., 1362 -1363).

(3) DEFENDANT'S FAILURE TO TAKE THE STAND AT GUILT TRIAL:

Of the 81 defendants who did not take the stand at guilt, 46 (56.8%) received death and 35 (43.2%) received life imprisonment. However, of the 150 defendants who did testify at the guilt trial, 56 (37.3%) received death, and 94 (62.7%) received life imprisonment. Id., 1360, 1411. These findings strongly support the conclusion that penalty juries are impermissibly penalizing defendants' exercise of their constitutional privilege against self-incrimination. Griffin v. California, 380 U.S. 609 (1965); United States v. Jackson, 390 U.S. 570 (1968); United States v. Simmons, 390 U.S. 377, 394 (1968).

(4) DEFENDANT'S OCCUPATIONAL STATUS AND ECONOMIC BACKGROUND:

The most frightening finding of the study is the fact that California juries are lenient toward white-collar defendants on the basis of this occupational status alone. Of the 157 defendants who held blue-collar jobs (craftsmen, foremen, operative workers, household workers, service workers, and laborers), 91 (57.9%) received life imprisonment, while 66 (42.1%) received the death penalty. Id., 1377. In contrast, of the 21 defendants who held white-collar jobs (professional, technical, manager,



officer, proprietor, clerical, sales, secretarial, and government service employees), 20 (95.2%) received life imprisonment and only 1 (4 .8%) received the death penalty. (Id., 1377, 1379). The following table shows the occupation of the defendant as compared to the incidence of life imprisonment and death (Id., 1384):

TABLE C10

Occupation of the Defendant

	Life	Percent	Death	Percent	Total
Not ascertained	0	0	3	100.0	3
Professional, Tech.	8	100.0	0	0	8
Manager, Officer, Proprietor	1	100.0	0	0	1
Clerical & Sales	9	90.0	1	10.0	10
Secretarial	1	100.0	0	0	1
Government Serv. Emp.	1	100.0	0	0	1
Total White Collar	20	95.2	1	4.8	21
Craftsman, Foreman	14	60.9	9	39.1	23
Operative	6	66.7	3	33.3	9
Household Wkr.	1	100.0	0	0	1
Service	14	63.6	8	36.4	22
Laborer	56	54.9	46	45.1	102
Total -Blue Collar	91	58.0	66	42.0	157

The simplest hypothesis to explain the association of white collar workers receiving life imprisonment rather than death is that juries are lenient toward such defendants on the basis of their occupational status alone. The authors

conclude that these results "strongly suggest that a blue-collar workers background was an aggravation, all other aspects of the cases held constant, and clearly indicate that a white-collar background was itself a significant mitigating attribute." Id., 1419. This economic bias in favor of the white-collar worker is clearly an irrational standard of decision-making and thus violative of due process and equal protection. Although it is possible to make a utilitarian argument that there is a rational distinction between white- and blue-collar defendants in that the former provide more "valuable"services to society, such a minimal justification for different treatment of the two groups is unacceptable and impermissible. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956), in which this Court rejected Illinois' "policy of economy" as a due process justification for its failure to bear the cost of appellate review for indigent defendants. [351 U.S. 12, 37].

The "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system--all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar

of justice in every American court.' Chambers v. Florida (1940) 309 U.S. 227, 241 [60 Sup. Ct. 472]." Griffin v. Illinois, supra, at 17; Douglas v. California, 372 U.S. 353, 356 -358 [83 Sup. Ct. 814 (1963)]; Yick Wo v. Hopkins, 118 U.S. 356, 369 [6 Sup. Ct . 1064 (1886)]; Traux v. Corrigan, 257 U.S. 312, 331-333 [42 Sup. Ct. 124 (1921)].

The equal protection clause precludes the arbitrary and capricious selection of a class of individuals for the imposition of a special burden. It requires as a minimum that legislative classifications be rationally related to a legitimate governmental purpose. Loving v. Virginia, 388 U.S. 1, 8-9 [87 Sup. Ct. 1817 (1967)]; Rinaldi v. Yeager, 384 U.S. 305, 308-309 [86 Sup. Ct. 1497 (1966)]; Blumenthal v. Board of Medical Examiners, 57 Cal. 2d 228, 233 [18 Cal. Rptr. 501, 368 P. 2d 101 (1962)]; Perez v . Sharp, 32 Cal. 2d 711, 714 [198 P. 2d 17 (1948)]. "But arbitrary selection can never be justified by calling it classifications". Gulf, Colorado & Santa Fe Ry . Co. v. Ellis, 165 U.S. 150, 159 [17 Sup. Ct. 255 (1897)]; McLaughlin v. Florida, 379 U.S. 184, 190 [85 Sup. Ct. 283 (1964)].

The mandate of the equal protection clause that the law "affect alike all persons similarly situated" requires the classifications imposing different treatment on selected groups of persons derive, not from whim or caprice, or hostility or favoritism towards particular individuals or groups, but from legitimate legisla-

tive objectives. Traux v. Corrigan, supra, at 332 -333; see generally Tussman & TenBroek, "The Equal Protection of the Laws", 37 Cal. L. Rev. 341, 344-347, 357-361 (1949). When such a classification does not bear at least a rational relation to a legitimate legislative purpose, or when the legislation fails to reveal any legitimate purpose in relation to which the classification can be justified, then the legislation fails because it creates an "invidious discrimination". McLaughlin v. Florida, supra, at 190, 194; Douglas v. California, supra, at 356; Skinner v. Oklahoma, 316 U.S. 535, 541 [62 Sup. Ct. 1110 (1942)].

As this Court held in Griffin v. Illinois, 351 U.S. 12, 17:

> "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."

Moreover, Griffin holds that distinctions based on wealth--at least those that discriminate against basic rights of the poor -- are assimilated to distinctions based on race and like those will be presumed invalid. Loving v. Virginia, supra; Rinaldi v. Yeager, supra ; McLaughlin v. Florida, supra; Jeffreys v. Jeffreys, 296 N.Y.S. 2d 74 (Sup. Ct. 1969). See also Roberts v. LaVallee, 389 U.S. 40 [88 Sup. Ct. 194 (1967)].

To allow jurors to put men to death because of their occupational status flaunts everything

◇

our judicial system allegedly stands for. To allow jurors even to consider such factors as occupational status in the determination of penalty is clearly violative of the constitutional mandate of equality before the law. Such considerations are impermissible in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has". Griffin v. Illinois, supra, 12, 19.

In rejecting the claim that the California practice of allowing the jury unguided discretion in determining penalty in capital cases is unconstitutional, the California Supreme Court stated that:

> "[t]he Legislature, by entrusting to the absolute discretion of the jury the decision between life imprisonment and death has indicated its belief that jurors understand the factors that are relevant to such a decision ." In re Anderson, 69 Cal. 2d 613, 625 (1968).

This assertion necessarily assumes that jurors implicitly follow standards that, though unarticulated, are rational or, in the court's words, "relevant" to the penalty decision. But, as the authors of the Stanford Law Review study conclude, this is no longer a valid assumption.

There is at least one standard (occupational status) in the cases studied that is plainly unconstitutional and another (unsuccessful attempt of insanity defense) that clearly flouts the policy of the California Legislature. It is regrettable that these findings were not available to the California Supreme Court when it decided In re Anderson; nevertheless, it is not too late to insure that jurors do not consider such factors as the defendant's failure to take the stand at the guilt trial, his unsuccessful attempt of the insanity defense, or his occupational status and economic background.

The very absence of any standards to govern the jury's determinations camouflage their illegality. If the jurors were instructed that they were licensed to consider such constitutionally impermissible factors as the wealth and status of the defendant, whether he invoked a diminished capacity or insanity defense or whether he was a caucasian or a citizen, this Court would have no difficulty in striking down their action. However, since no standards are articulated whatsoever, it is assumed, with no foundation, that the jury — unlike a judge — knows what it legally may consider and not consider and acts accordingly.

There is one additional argument which the California Court in Anderson did not consider which counsel earnestly feels supplies the coup

de grace as far as the standardless penalty procedure is concerned. One essential and overwhelming distinction between different types and gradations of sentences and the death penalty is the latter's finality and what flows from that realization. It is true that judges every day award different sentences to different defendants. However, when the death sentence is meted out without any articulated basis for it, effectively a class of persons is created who cannot receive the benefits of future changes in the law which may accrue to their benefit such as the declaring of the Little Lindbergh Law unconstitutional which would have saved the life of Chessman were he still living at the time of the decision. See People v. Daniels, 71 A.C. 11, 80 Cal. Rptr. 897 (1969). Moreover it denies the ameliorative prospects of legisla - tive change in the form of legalizing the formerly condemned behavior or diminishing the penalty; finally, prospects for future proof of innocence and pardon disappear with the defend- ant's execution. And innocence subsequently discovered is not foreign to our system of justice. See cf. Frank & Frank, Not Guilty , (1957);Borchard, Convicting the Innocent (1932) Imprisonment keeps all of these possibilities viable. It may be that a person while in prison will die a natural death or no change will ensue but that is not a state responsibility. What is directly attributable to the standardless decision

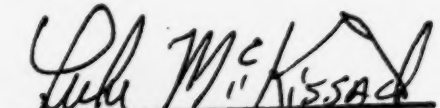
for death and its effectuation is the eternal ineligibility for relief that is denied to no other prisoner. Suppose, for example, that the jury was permitted to elect between two penalties — one, life imprisonment and two life imprisonment with the disabling condition that none of the aforementioned advantages could ever inure to the prisoner. Is there any doubt that the equal protection clause would be clearly flouted and relief would be accorded the convicted man? And yet here the same result obtains with even greater finality . And it is that irremediable classification which spells the destruction of the argument for upholding 190 and 190.1 of the California Penal Code.

While Petitioner believes that Penal Code Section 190 and 190.1 violate the due process and equal protection clauses of the United States Constitution because these sections provide absolutely no standards for the determination of penalty, this court need not reach that question. It would be enough for this court to enunciate those standards which the jury may consider and those standards which it may never consider in the determination of penalty. Absent such restraints, we encourage the continued consideration by the jury of significant irrational and impermissible factors.

Conclusion

Petitioner's conviction should be reversed.

Respectfully submitted,



Luke McKissack

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California Penal Code, Section 190:

MURDER; PUNISHMENT; DISCRETION OF JURY

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

California Penal Code, Section 190.1:

SENTENCES OF DEATH OR IMPRISONMENT FOR LIFE; DETERMINATION; MINORS UNDER 18

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances

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California Penal Code, Section 190.1:

SEPARATE TRIAL OF ISSUES OF DEATH OR IMPRISONMENT FOR LIFE; DETERMINATION; MINORS UNDER 18

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surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of

penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.